UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-23743-CIV-HUCK/OTAZO-REYES

RICARDO DEVENGOECHEA,

Plaintiff,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, a foreign state,

Defendant.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court for hearing held on October 22, 2014 on the following matters:

(1) Garnishee Bank of America, N.A.'s Emergency Motion for Clarification (hereafter, "Emergency Motion") and Demand for Attorney's Fees [D.E. 34, 36]. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636 by the Honorable Jose E. Martinez, United States District Judge, on behalf of the Honorable Paul C. Huck, United States District Judge [D.E. 35, 38]; and

(2) Defendant Bolivarian Republic of Venezuela's ("Defendant" or "Venezuela") Motion to Dissolve Writ of Garnishment (hereafter, "Motion to Dissolve") [D.E. 52]. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636 by the Honorable Paul C. Huck, United States District Judge [D.E. 59].

For the reasons stated below, the undersigned respectfully recommends that the Motion to Dissolve be GRANTED and the Emergency Motion be DENIED as moot.

PROCEDURAL BACKGROUND

On October 15, 2012, Plaintiff Ricardo Devengoechea ("Plaintiff") filed a Complaint against Venezuela, alleging violation of international law pursuant to the sovereign immunity expropriation exception in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3). Plaintiff's claims arise from Venezuela's alleged expropriation of his antiquities relating to General Simon Bolivar [D.E. 1]. On August 21, 2013, Plaintiff moved for the entry of an Order of Default and a Default Final Judgment of liability against Venezuela, and requested a one day bench trial to determine the amount of Plaintiff's damages [D.E. 10]. On August 23, 2013, the Clerk entered default against Venezuela [D.E. 12]. After a bench trial held on April 18, 2014, the Court issued its Findings of Fact and Conclusions of Law and a Final Judgment against Venezuela [D.E. 26, 27]. The Final Judgment provides that Plaintiff shall recover from Venezuela the amount of $7,464,953.12, inclusive of damages, pre-judgment interest, and case costs and expenses, plus post-judgment interest at the statutorily prescribed rate [D.E. 26].

On October 8, 2014, Plaintiff filed a Motion for Issuance of a Post-Judgment Writ of Garnishment on Bank of America Corporation (hereafter, "Motion for Writ") [D.E. 30]. On that same day, the Clerk of Court issued the requested Writ of Garnishment (hereafter, "Writ") [D.E. 31]. Garnishee Bank of America, N.A. ("Garnishee") answered the Writ on October 15, 2015, identifying seventeen bank accounts relating to Venezuela's Embassies, Consulates and Missions within the United States (hereafter, the "Garnished Accounts") [D.E. 33 at ¶ 2].[1] Together with its Answer, Garnishee filed the Emergency Motion pursuant to Fla. Stat. § 77.06(3), stating that in good faith it was in doubt as to whether the Garnished Accounts were required by law to be included in the Answer or retained by Garnishee [D.E. 34 at 2]. Garnishee articulated two bases

[1] The Missions are those to the United Nations ("UN") and the Organization of American States ("OAS"). Id.

for its good faith doubt: the potential immunity of the Garnished Accounts; and the Court's potential lack of *in rem* jurisdiction over the Garnished Accounts, which were opened in the District of Columbia. Id. at 3-5.[2]

The undersigned held an initial hearing on the Emergency Motion on October 17, 2014 and issued an Order providing that:

> 1. Garnishee is directed to **temporarily** permit the processing of transactions submitted by Defendant with respect to the accounts listed on exhibit B of the Emergency Motion (hereafter, "Garnished Accounts") [D.E. 34 at 14-24], subject to the following condition: the only transactions Defendant may submit with respect to the Garnished Accounts are those transactions that will enable Defendant to continue to conduct its ordinary course of business. However, Garnishee shall be under no obligation to screen the transactions submitted by Defendant for compliance with this requirement.
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> 2. Further, Garnishee is directed not to permit any of the Garnished Accounts to be closed.

[D.E. 40 at 1] (emphasis in original).[3] On October 22, 2014, the undersigned held a continued hearing on the Emergency Motion at which the Motion to Dissolve was also addressed. For purposes of the hearing, undersigned also had the benefit of a Statement of Interest filed by the United States Department of Justice ("United States") pursuant to 28 U.S.C. § 517 [D.E. 57]. The Motion to Dissolve and the Statement of Interest raised the same immunity and jurisdictional arguments as the Emergency Motion, as well as a contention that the Writ was procedurally defective for failure to comply with FSIA. As more fully set forth below, the undersigned concludes that the procedural and immunity arguments are meritorious and the Writ

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[2] In addition to filing the Motion for Writ, Plaintiff served a Subpoena Duces Tecum on Garnishee on October 9, 2014 [D.E. 51-6].

[3] This temporary measure was intended to alleviate the repercussions arising from Venezuela's inability to access its accounts. See Transcript of October 17, 2014 Hearing [D.E. 42 at 3]. The Order remains in full force and effect. See Order on Continued Hearing [D.E. 61 at 2].

should be dissolved.[4]

THE WRIT IS PROCEDURALLY DEFECTIVE UNDER FSIA

FSIA provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609. See also H.R. Rep. No. 94-1487, at 28 (1976) *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 (The "term 'attachment in aid of execution' [in FSIA] is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment."). FSIA further provides:

> No attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

28 U.S.C. § 1610(c). See also H.R. Rep. 94-1487, at 30 (1976) *reprinted in* 1976 U.S.C.C.A.N. 6604, 6629 (explaining that allowing a judgment creditor to attach or execute on a foreign state's property simply by applying to the clerk or a local sheriff "would not afford sufficient protection to a foreign state"); Avelar v. J. Cotoia Const., Inc., No. 11-CV-2172 (RRM)(MDG), 2011WL 5245206, at *5 n.8 (E.D.N.Y. Nov. 2, 2011) ("[T]he FSIA requires that any steps taken by a judgment creditor to enforce the judgment must be pursuant to a court order authorizing the enforcement, independent of the judgment itself, and not merely the result of the judgment creditor's unilateral delivery of a writ to the sheriff or marshal.").

In this case, it is undisputed that Plaintiff did not seek, and the Court did not issue, the order required by FSIA's Section 1610(c). Plaintiff's Motion for Writ was only directed to the

[4] Thus, the undersigned need not address the question of whether the Court has *in rem* jurisdiction over the Garnished Accounts.

Clerk of Court. See Motion for Writ [D.E. 30 at ¶ 6] ("Plaintiff moves the Clerk of the Court to issue a post-judgment Writ of Garnishment to Bank of America in connection with Defendant."). Indeed, the Writ was issued by the Clerk on the same day that the Motion for Writ was filed [D.E. 31]. This failure to comply with FSIA on the part of Plaintiff renders the Writ procedurally defective and subject to dissolution. Avelar, 2011 WL 5245206, at *5 n.8 ("Plaintiff's failure to procure an independent court order requires also that the enforcement mechanisms be vacated."). Therefore, on this basis alone, Venezuela's Motion to Dissolve should be granted.

THE GARNISHED ACCOUNTS ARE IMMUNE FROM GARNISHMENT PURSUANT TO INTERNATIONAL TREATIES

In addition to being procedurally defective, the Writ is subject to dissolution because the Garnished Accounts are immune from garnishment pursuant to international treaties. As previously noted, FSIA provides:

> **Subject to existing international agreements to which the United States is a party at the time of enactment of this Act** the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609 (emphasis added). Thus, FSIA is "not intended to affect . . . either diplomatic or consular immunity." H.R. Rep. No. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610. See also 767 Third Ave. Assocs. v. Permanent Mission of The Republic of Zaire to U.N., 988 F.2d 295, 298 (2d Cir. 1993) ("Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by [FSIA].").

In support of the Motion to Dissolve, Venezuela filed the following three declarations:

1. Declaration of Paula Carozzo De Abreu, Alternate Ambassador of the Permanent Mission of the Bolivarian Republic of Venezuela to the Organization of American States

("Permanent Mission") (hereafter, "Carozzo De Abreu Decl.") [D.E. 51-2]. Therein, Ms. Carozzo De Abreu declares that she is familiar with and has personal knowledge of two of the Garnished Accounts (the "OAS Mission Accounts") and how the funds in the OAS Mission Accounts are used. Id. at ¶ 3-4. She adds:

> The [OAS] Mission Accounts are not used for commercial purposes. Rather, the [OAS] Mission Accounts are utilized by the Permanent Mission solely for the maintenance of the full facilities of Venezuela to perform its diplomatic functions as the official representative of Venezuela in the Organization of America [sic] States ("OAS"), including payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with diplomatic activities necessary to the proper functioning of the Permanent Mission.

Id. at ¶ 4.

2. Declaration of Williams Suarez, Counselor to the Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations ("Permanent Mission") (hereafter, "Suarez Decl.") [D.E. 51-3]. Therein, Mr. Suarez declares that he is familiar with and has personal knowledge of two of the Garnished Accounts (the "UN Mission Accounts") and how the funds in the UN Mission Accounts are used. Id. at ¶ 3-4. He adds:

> The [UN] Mission Accounts are not used for commercial purposes. Rather, the [UN] Mission Accounts are utilized by the Permanent Mission solely for the maintenance of the full facilities of Venezuela to perform its diplomatic functions as the official representative of Venezuela in the United Nations, including payment of salaries and wages of personnel and various ongoing expenses incurred in connection with diplomatic activities necessary to the proper functioning of the Permanent Mission.

Id. at ¶ 4.

3. Declaration of Marlene Gonzalez, Minister Counselor for the Embassy of the Bolivarian Republic of Venezuela to the United States of America ("Embassy") (hereafter, "Gonzalez Decl.") [D.E. 51-4]. Therein, Ms. Gonzalez declares that she is familiar with and has personal knowledge of thirteen of the Garnished Accounts (the "Embassy Accounts") and how the funds in the Embassy Accounts are used. Id. at ¶ 3-4. She adds:

> The Embassy Accounts are not used for commercial purposes. Rather, the Embassy Accounts are utilized by the Embassy and the Consulates [of Venezuela] solely for the maintenance of the full facilities of Venezuela to perform its diplomatic and consular functions as the official representative of Venezuela in the United States of America, including payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with diplomatic and consular activities necessary to the proper functioning of the Embassy and the Consulates.

Id. at ¶ 4.

Based on these declarations, the Garnished Accounts fall into three categories: OAS Mission Accounts; UN Mission Accounts; and Embassy Accounts. With regard to the Embassy Accounts, the pertinent treaties are the Vienna Convention on Diplomatic Relations ("VCDR") and the Vienna Convention on Consular Relations ("VCCR"). Article 25 of the VCDR provides that "the receiving state shall accord full facilities for the performance of the functions of the mission." VCDR, art. 25, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Article 28 of the VCCR similarly provides that "the receiving state shall accord full facilities for the performance of the functions of the consular post." VCCR, art. 28, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820. With regard to the UN Mission Accounts, the U.N. Charter provides that "representatives of the Members of the United Nations . . . shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." U.N. Charter, art. 105, para. 2, June 26, 1945, 59 Stat. 1031, T.S. No. 993. In addition, the United States has agreed that representatives to the U.N. "shall . . . be entitled . . . to the same privileges and immunities . . . as [the United States] accords to diplomatic envoys accredited to it." Agreement Between the United States and the U.N. Regarding the Headquarters of the U.N., art. V, § 15, June 26, 1947, 61 Stat. 3416, T.I.A.S. 1676; see also Convention on Privileges and Immunities of the U.N., art. IV, § 11(g), Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. 6900 (entered into force with respect to the United States Apr. 29, 1970) (stating that representatives of U.N.

members shall enjoy "such . . . privileges, immunities and facilities . . . as diplomatic envoys enjoy"). With regard to the OAS Mission Accounts, the bilateral agreement between the United States and the OAS on privileges and immunities provides that certain diplomatic-level mission members enjoy "[t]he privileges and immunities which the Government of the United States of America accords to diplomatic envoys accredited to it." Agreement Between the United States and the OAS, art. 1, Mar. 20, 1975, 26 U.S.T. 1025, T.I.A.S. 8089; see also 22 U.S.C. § 288g.

In addressing the "full facilities" language from the VCDR and VCCR, courts have found that bank accounts used by a mission for diplomatic purposes are immune, as they are necessary for the mission to function. Liberian Eastern Timber Corp. v. The Government of the Republic of Liberia, 659 F. Supp. 606, 608 (D.D.C. 1987) (finding embassy bank accounts to be immune from attachment under the Vienna Convention, citing VCDR art. 25); Avelar, 2011 WL 5245206 at *4 (citing the VCDR and vacating enforcement mechanisms undertaken to enforce a default judgment against the Congo Republic's UN Mission); Foxworth v. Permanent Mission of Republic of Uganda to U.N., 796 F. Supp. 761, 763 (S.D.N.Y. 1992) (holding that "attachment of defendant's bank account [was] in violation of the United Nations Charter and the Vienna Convention because it would force defendant to cease operations").

Here, the declarations filed by Venezuela state that the Garnished Accounts are used solely for diplomatic or consular functions. See Carozzo De Abreu Decl., Suarez Decl., and Gonzalez Decl. These declarations are sufficient to establish that the Garnished Accounts are immune from attachment. Avelar, 2011 WL 5245206, at *4 ("A sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes.").[5] Therefore, for the additional reason that the Garnished Accounts are immune from attachment

[5] Although the declarations submitted by Venezuela are not from mission heads, each of the declarants has stated that he or she is familiar with the accounts at issue. Hence, the undersigned affords the declarations the same dignity as if they had been executed by mission heads.

under international treaties, Venezuela's Motion to Dissolve should be granted.

PLAINTIFF IS NOT ENTITLED TO DISCOVERY FOR PURPOSES OF DETERMINING WHETHER THE FSIA COMMERCIAL ACTIVITY EXCEPTION APPLIES

Because the Writ is procedurally defective and the Garnished Accounts are immune from attachment under international treaties, the undersigned need not address Plaintiff's contention that the Garnished Accounts are subject to garnishment pursuant to FSIA's commercial activity exception and that he is entitled to discovery on this issue.[6] In any event, the following comments with regard to discovery of diplomatic bank accounts are instructive:

> [A] diplomatic mission would undergo a severe hardship if a civil judgment creditor were permitted to freeze bank accounts used for the purposes of a diplomatic mission for an indefinite period of time until exhaustive discovery had taken place to determine the precise portion of the bank account used for commercial activities.

Liberian Eastern Timber, 659 F. Supp. at 610. Therefore, Plaintiff's request for discovery on the Garnished Accounts should be denied and the subpoena issued to Garnishee should be quashed.

RECOMMENDATION

Based on the foregoing considerations, it is RESPECTFULLY RECOMMENDED that:

1. The Motion to Dissolve be GRANTED;

2. The Emergency Motion be DENIED AS MOOT;

3. Plaintiff's request for discovery be DENIED; and

4. The Court reserve jurisdiction to address Garnishee's Demand for Attorney's fees.[7]

Due to the importance of this matter to the interests of the United States, as reflected in

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[6] One of the exceptions to sovereign immunity under FSIA applies to property that is "used for a commercial activity in the United States." 28 U.S.C. § 1610(a).

[7] Should the Court adopt this Report and Recommendation, the undersigned will immediately vacate the October 17, 2014 Order [D.E. 40] and quash the Subpoena Duces Tecum served on Garnishee [D.E. 51-6].

the Statement of Interest [D.E. 57], the undersigned will shorten the time for filing objections to this Report and Recommendation. The parties have **five (5) days** from the date of receipt of this Report and Recommendation within which to serve and file objections, if any, with the Honorable Paul C. Huck, United States District Judge. See Local Magistrate Rule 4(b). Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. See Resolution Trust Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 28th day of October, 2014.

ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Paul C. Huck
Counsel of Record